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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re D.J. et al., Persons Coming Under  
the Juvenile Court Law.

KERN COUNTY DEPARTMENT OF  
HUMAN SERVICES,

Plaintiff and Respondent,

v.

D.M.,

Defendant and Appellant.

F072849

(Kern Super. Ct. Nos. JD133916,  
JD133917)

**OPINION**

**THE COURT\***

APPEAL from orders of the Superior Court of Kern County. Louie L. Vega,  
Judge.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Theresa A. Goldner, County Counsel, and Jennifer E. Feige, Deputy County  
Counsel, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Gomes, J., and Kane, J.

Appellant D.M. (“mother”) has two daughters, one-year-old D.J. and two-year-old R.J., the subjects of this appeal. At a Welfare and Institutions Code section 366.26 hearing<sup>1</sup> in December 2015, the juvenile court denied mother’s oral motion under section 388 to reinstate reunification services and terminated her parental rights. Mother contends the court erred in not conducting an evidentiary hearing. We conclude the juvenile court conducted a hearing but abused its discretion in denying the section 388 petition and reverse.

### **PROCEDURAL AND FACTUAL SUMMARY**

Mother and her daughters first came to the attention of the Kern County Department of Human Services (department) in August 2014 when newborn D.J. tested positive for methamphetamine and marijuana. Mother, then 18 years old, admitted using drugs. She first used drugs at the age of 15 when she was introduced to marijuana. She had been using marijuana regularly for approximately a year before D.J.’s birth to relieve back pain. Though she was using marijuana medicinally, it was not prescribed for her.

Social worker Monica Fitzgerald interviewed the children’s 21-year-old father (“father”) who also admitted using marijuana and methamphetamine. He and mother agreed to participate in substance abuse treatment, attend parenting classes and drug test as part of a voluntary family maintenance plan. Father told Fitzgerald he had been recently arrested for child endangerment and possession of a controlled substance.

Fitzgerald obtained copies of two reports from the sheriff’s department regarding incidents that occurred in May and November of 2014 at mother and father’s residence. In May 2014, a deputy found marijuana pipes, a pellet gun, a knife and a clear baggy of suspected methamphetamine all within reach of then nine-month-old R.J. who was crawling on the floor. Father was charged with possession of a controlled substance and willful cruelty to a child. In November 2014, a deputy responded to a report of spousal

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code.

abuse. During an argument, father grabbed mother and pushed her onto the bed. He jumped on top of her, pinned her to the bed and socked her several times in the face, causing her eyes and the left side of her face to bruise. He denied hitting her.

In December 2014, Fitzgerald received a call from mother's step-mother, Candie, stating that she found two bottles of urine and a pipe with methamphetamine in mother's room. She suspected mother was providing someone else's urine for testing. At the time of the call, mother was attending substance abuse counseling. Mother admitted that the pipe was hers and that she used methamphetamine earlier that morning but denied substituting someone else's urine for her own. Mother initially agreed to leave the children with Candie for their safety but subsequently changed her mind and took the children with her.

The department filed a dependency petition on the children's behalf, alleging mother and father endangered them by using methamphetamine and marijuana and engaging in domestic violence. The juvenile court issued a protective warrant for the children and scheduled a detention hearing. The department took the children into protective custody and placed them together in foster care.

In its report for the detention hearing, the department informed the juvenile court mother had no prior child welfare history and no adult criminal history. Her only charge was for possession of marijuana in May 2011 when she was a juvenile. Father's only adult criminal history involved his arrests in May and November of 2014. The May 2014 charge for willful cruelty to a child was dismissed as the result of a *Harvey*<sup>2</sup> waiver that allowed father to complete a 52-week parenting class. He pled guilty to possession of a controlled substance and was accepted into the Deferred Entry of Judgment Program. The November 2014 charge for corporal injury on a spouse was rejected by the district attorney's office, pending further investigation. The department reported that mother and

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<sup>2</sup> *People v. Harvey* (1979) 25 Cal.3d 754.

father drug tested during the months of September through December of 2015. Mother tested negative and father tested positive three times, twice for marijuana only and once for marijuana and methamphetamine.

In December 2014, the juvenile court conducted the detention hearing. Mother and father appeared and were appointed counsel. Relatives, including the paternal aunt were present. The court deemed father to be the children's presumed father and detained the children. The court ordered the department to provide weekly supervised visitation and ordered mother and father to drug test. The court set a combined hearing on jurisdiction and disposition for February 2015.

Following the detention hearing, social worker Stephanie Meek met with father and he signed a plan agreeing to participate in substance abuse and domestic violence counseling, complete a 52-week parenting program and drug test. Father told Meek he and mother were no longer in a relationship.

In January 2015, Meek met with mother to discuss her case plan. Mother was then living at Casa Serena, a sober living home, attending substance abuse and parenting classes and Narcotics/Alcoholics Anonymous (NA/AA) meetings and randomly drug testing. She had a sponsor and had been clean and sober for 34 days.

In February 2015, the department placed the children with their paternal aunt. That same month, the juvenile court conducted an uncontested jurisdiction/ disposition hearing. Mother and father submitted the petition on the social worker's report and waived their right to a hearing. The court found the allegations true, ordered the children removed from parental custody and ordered mother and father to participate in counseling for domestic violence, substance abuse and parenting and submit to random drug testing. The court increased visitation to twice weekly and set the six-month review hearing for August 2015.

In early March 2015, mother completed a parenting program. She also left drug treatment. She explained to social worker Stacy Fox that she moved to Tupman and was

trying to get her case transferred to a substance abuse program in Taft because of transportation problems. She said she made an appointment with the gatekeeper but the gatekeeper did not keep the appointment. In late May 2015, mother met with the gatekeeper and was referred to Kern County Mental Health (KCMH)-CalWorks where she began substance abuse counseling in June 2015. During that time period, mother was not compliant with the drug-testing requirement because she either failed to test or tested positive for marijuana. In addition, she was not participating in domestic violence counseling. However, she informed Fox at their monthly meetings that she was having difficulty enrolling in the domestic violence program and asked Fox for help.

In July 2015, the department filed its report for the six-month review hearing. The department reported that mother and father visited the children fairly regularly but had not addressed the problems that necessitated the children's removal. Specifically, they had not enrolled in their domestic violence counseling and they continued to use drugs. Consequently, the department recommended the court terminate their reunification services and set a section 366.26 hearing.

In August 2015, mother and father appeared with their attorneys at the six-month review hearing. Mother's attorney made an offer of proof that mother completed the inpatient program at Casa Serena in February 2015 and acknowledged she experienced some "starts and stops" with respect to outpatient substance abuse counseling. However, mother attributed her delay in initiating outpatient counseling to her move to Tupman and inability to attend counseling sessions in Bakersfield. She had since relocated to Bakersfield and had completed phase one of the Kern County Mental Health Matrix outpatient program and had been in phase two, the relapse prevention program, for approximately two months. Mother's attorney stated that mother did not dispute that she used marijuana during the prior six months, but explained that she was no longer covered by her grandmother's medical insurance. Therefore, she was not covered for the pain medication she needed for her back and she could not afford the out-of-pocket expense so

she used marijuana instead. She had since resolved that issue. Mother further offered that she was drug testing for the department and through her counseling program and was no longer using methamphetamine. She asked the court to permit her to demonstrate her sobriety. The court accepted mother's offer of proof.

Father's attorney asked the juvenile court to continue reunification services for father. He stated that father re-enrolled in substance abuse treatment in late July 2015 and was projected to complete his treatment in December 2015. He was also enrolled in a parenting program and domestic violence counseling and making progress.

The juvenile court terminated reunification services for both parents and set a section 366.26 hearing to be conducted in December 2015. Neither parent challenged the court's setting order by extraordinary writ petition.

In its report for the section 366.26 hearing, the department recommended the juvenile court terminate mother and father's parental rights and free the children for adoption. Mother and father consistently visited the children and the children were bonded to them and looked forward to seeing them. However, the paternal aunt and her partner ("the prospective adoptive parents") had had a relationship with the children since birth and the children looked to them as their primary caregivers and did not appear to have difficulty separating from their parents when their visits were over. The department acknowledged the children would suffer some loss if parental rights were terminated but believed the children's best interest would be served by moving toward a permanent plan of adoption. The department advised the court that the prospective adoptive parents supported postadoptive contact.

In December 2015, the juvenile court convened the section 366.26 hearing. Mother's attorney requested a continuance so that he could file a section 388 petition. He stated mother had provided him several documents that he believed substantiated a meaningful and meritorious section 388 petition. He explained that he had not had the opportunity to file a section 388 petition before the hearing because mother had moved

twice and they had not had contact until the hearing. Father joined in the request for a continuance. County counsel asked for an offer of proof. Mother's attorney stated he had a letter from mother's substance abuse counselor, stating that she would complete the KCMH-CalWorks behavioral health and substance abuse program in nine days. In addition, she had been drug testing and provided seven negative drug test results since September. She was attending NA/AA meetings daily and provided documentation of her attendance. She completed 10 of 26 domestic violence counseling sessions and expected to complete the program in three months.

County counsel argued mother and father had not shown good cause to continue the hearing. She also stated that even if the juvenile court were to entertain an oral section 388 petition, there would not be sufficient information to set a hearing. She argued that mother and father's circumstances were changing but had not changed because they had not completed the requirements of their case plans. She advised the court that the paternal aunt wanted to adopt the children and argued there was no indication that reinstating reunification services would be in the children's best interests.

The juvenile court, addressing mother and father's attorneys stated, "I believe I can allow you to proceed on an oral 388." Father's attorney made an offer of proof on his behalf which the court accepted. The court asked mother's attorney what evidence he would like to present. He said he could provide the documents to which he previously referred and have them marked and admitted into evidence. He said mother had additional negative drug test results but had not been able to obtain the actual documents. He referred back to mother's offer of proof that she expected to complete the domestic violence program in approximately three months. He also said that she arranged to stay with her grandmother if the children were returned to her so that they would have adequate housing. The court accepted mother's offer of proof and heard argument. Mother's attorney argued that she regularly visited the children and that they were bonded to her. He asked the court to reinstate her services.

The juvenile court acknowledged that the children's relationship with their parents was significant and substantial. The court stated, "In all the years that I've done this job, I don't know that I've ever seen a summary on the parents' visitation that ever painted the relationship between parents and children any brighter than this particular recitation." However, the court stated that it also had to consider how well the parents addressed the problems that necessitated the children's removal. The court found that the parents were beginning to make some progress but had significant aspects of their former reunification programs to complete and that the children could not be safely returned to their custody. The court denied the "oral [388's]."

Mother's attorney then asked the juvenile court to find that it would be detrimental to the children to terminate mother's parental rights under the beneficial relationship exception to adoption<sup>3</sup> and order legal guardianship in lieu of adoption. The court found that the children were likely to be adopted and acknowledged that terminating mother and father's parental rights may result in some detriment to the children given their relationship with their parents. However, the court did not find that the benefit of continuing that relationship outweighed the benefit of adoption and terminated parental rights.

This appeal ensued.

## **DISCUSSION**

Mother contends the juvenile court erred in summarily denying her section 388 petition made orally during the section 366.26 hearing. She argues she made the requisite prima facie showing, and therefore, was entitled to a full hearing on the matter. Respondent argues the juvenile court conducted a full evidentiary hearing on mother's

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<sup>3</sup> The "beneficial relationship exception" is one of several exceptions to adoption set forth in section 366.26, subdivision (c)(1)(B). The exception applies when the "parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)



oral modification petition and properly denied it. We agree the juvenile court conducted an evidentiary hearing but conclude the juvenile court abused its discretion in denying mother's section 388 petition.

Under section 388, a parent may petition to change or set aside a prior order "upon grounds of change of circumstance or new evidence." (§ 388, subd. (a)(1).) "[T]he parent must sufficiently allege both a change in circumstances or new evidence and the promotion of the child's best interests." (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1157, italics omitted.)

Section 388 contemplates a written motion in the form of a "petition." In fact, oral petitions pursuant to section 388 are not authorized in the dependency statutory scheme. (§§ 300 et seq.) Further, the juvenile court is not required to entertain an oral motion under section 388 at the time set for the section 366.26 hearing. Nevertheless, the court is not precluded from doing so. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 609.)

" 'If it appears that the best interests of the child may be promoted by the proposed change of order ... the court shall order that a hearing be held.' (§ 388, subd. (c).) However, the court may summarily deny the motion if the petition fails to make a prima facie showing (1) of a change of circumstances or new evidence requiring a changed order, and (2) the requested change would promote the best interests of the child. [Citation.] In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case." (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

In this case, what started out with mother's request for a continuance of the section 366.26 hearing evolved into an evidentiary hearing on her oral section 388 petition. This is clear from the sequence of events. Mother's attorney asked for a continuance and county counsel asked for an offer of proof which mother's attorney provided. County counsel opposed a continuance and the juvenile court allowed counsel to "proceed on an oral 388." Mother's attorney made an offer of proof as to what she would testify to

regarding her sobriety, her progress in domestic violence counseling and her plan for providing the children a home. Her attorney provided documentation to support mother's offer of proof and argued that the children were bonded to her and that there was still time for her to complete her court-ordered services and reunify with them within the statutory limitation on reunification.

In effect, the juvenile court conducted a hearing based on mother's offer of proof, documentary evidence and argument. Mother acknowledges a juvenile court may rely on an offer of proof in conducting a hearing, but asserts it was clear that she wanted to present live testimony. We find nothing in the record to suggest that mother wanted to present live testimony or any other evidence to support her oral motion. We conclude, nevertheless, that the juvenile court abused its discretion in denying mother's section 388 petition.

"The most sustained reflection on the nature and role of section 388 appears in our Supreme Court's decision in *In re Marilyn H.* [(1993)] 5 Cal.4th 295. Essentially, *Marilyn H.* teaches us that section 388 *really is* an 'escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights. [Citation]. As such, section 388 is vital to the *constitutionality* of our dependency scheme as a whole, and the termination statute, section 366.26, in particular." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528 (*Kimberly F.*).

Further, "*Marilyn H.* makes clear that reunification pursuant to section 388 must remain a viable possibility even after the formal termination of reunification services ... if there is, as the court put it, a 'legitimate change of circumstances.' ... It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child." (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 529.)

Determining whether a legitimate change has occurred and whether that change compels a procedural shift in focus is complex and multi-factorial. The court in *Kimberly F.* provided guidance in making that determination that we find instructive. The *Kimberly F.* court reversed a juvenile court order denying a parent's section 388 petition, concluding the juvenile court abused its discretion. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 535.) In so doing, the court identified three principal factors inherent in the dependency statutes that provide a reasoned and principled basis on which to evaluate a section 388 petition. (*Kimberly F.*, *supra*, 56 Cal.App.4th at pp. 530-532.) Summarized, those factors are: (1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been (hereafter "the *Kimberly F.* factors"). (*Id.* at p. 532.)

The juvenile court's decision whether to change an order by granting a section 388 petition "[is] committed to the sound discretion of the juvenile court, and [its] ruling should not be disturbed on appeal unless an abuse of discretion is clearly established." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) An abuse of discretion occurs when the juvenile court has exceeded the bounds of reason "by making an arbitrary, capricious or patently absurd determination." (*Id.* at p. 318.)

Here, mother sought to have her reunification services reinstated via her motion under section 388. She presented evidence that she was clean and sober and working a recovery program. She participated in random drug testing with negative results, attended NA/AA meetings and was poised to complete a behavioral health and substance abuse treatment program in nine days and a domestic violence counseling program in three months. Her attorney argued that the children were bonded to her, a fact the department affirmed in its report for the section 366.26 hearing.

In ruling, the juvenile court acknowledged that mother and the children had a “significant and substantial” relationship. However, the court found in essence that mother failed to show that there had been a change in circumstances. The court stated, “[B]oth parents are at this point beginning to make efforts to address the problems that led to the removal of the children from their care and certainly have started to address those issues and have made some progress ....” However, the court did not believe the children could be returned to parental custody at that time or after a continuation of reunification services, stating “[W]e are not in a situation where the children can be returned safely to the custody of their parents as both parents still have significant aspects of their former reunification programs to complete.”

We turn to the merits of mother’s petition. Applying the *Kimberly F.* factors, we conclude they uniformly favor mother. On the first *Kimberly F.* factor, the seriousness of the problem, the juvenile court exercised its dependency jurisdiction because mother used marijuana and methamphetamine and had been the victim in one domestic violence incident with father. The circumstances necessitating court action, though not benign, were not dispositive on this factor. Many parents involved in dependency cases report extensive and chronic histories of drug use and ongoing domestic violence. Mother, in contrast, reported at most a year of regular marijuana use and recent methamphetamine use. Further, unlike many other cases, mother had no drug-related adult crimes, no child welfare history and no other documented domestic violence incidents.

The second *Kimberly F.* factor requires the juvenile court to evaluate the strength of the relative bonds between the dependent child and his or her parent, compared with the strength of the child’s bond to his or her present caretakers. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531.) In this case, the children were bonded to their parents and their caregivers. There is no evidence they were more bonded to one over the other. However, the record reflects that they were sufficiently bonded to their parents such that they would be harmed if that relationship was severed.

The third *Kimberly F.* factor examines the degree to which the problem may be easily removed and the degree to which it has been. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531.) When the juvenile court terminated mother's reunification services in August 2015, she was in the second phase of outpatient drug treatment. She was no longer using methamphetamine but continued to use marijuana for pain relief. She was not participating in domestic violence counseling but was separated from father. By the time mother argued her section 388 petition, she was no longer using methamphetamine *or* marijuana and was within nine days of completing drug treatment. In addition, she was nearly halfway through a domestic violence program which she expected to complete in three months. In effect, mother through her own initiative and without any assistance from the department made extraordinary progress in ameliorating her problems if not eliminating them entirely.

The third *Kimberly F.* factor also brings to bear another consideration which is particularly important in this case and that is the *reason* the change did not occur sooner. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531.) Domestic violence was a major component of mother's services plan. Yet, despite her repeated requests for assistance, the department made no effort to facilitate her enrollment in a domestic violence program. One can only wonder what the outcome would have been in this case if the department had provided more assistance.

We conclude the juvenile court abused its discretion in denying mother's section 388 petition. Mother's infant children were removed from her because she used marijuana and methamphetamine and was involved in one incident of domestic violence. She promptly separated from father, entered drug treatment and obtained a sponsor. Within six months, she had completed a parenting program, inpatient and outpatient drug treatment and was participating in outpatient substance abuse counseling. Further, mother continued to participate in substance abuse counseling, even after her reunification services were terminated. She also remained separated from father,

abstained from using methamphetamine, discontinued her use of marijuana and enrolled herself in a domestic violence program. All the while, mother regularly visited the children and remained lovingly bonded to them. In sum, mother demonstrated not only a legitimate change in her circumstances but that reinstating her reunification services would be in her children's best interests. Further, since only a year had lapsed since the children were taken into protective custody, the juvenile court was not statutorily barred from continuing reunification services for mother. (§ 361.5, subd. (a)(3).)

We reverse the order denying mother's section 388 petition. Consequently, we also reverse the orders terminating mother and father's parental rights. (*In re A.L.* (2010) 190 Cal.App.4th 75, 78-79.)

### **DISPOSITION**

The orders denying mother's petition for modification and terminating mother and father's parental rights are reversed, and the matter is remanded to the juvenile court. The court is directed to enter a new order granting mother six months of reunification services unless the department demonstrates based upon grounds of change of circumstance or new evidence that arose after the denial of the section 388 petition on December 9, 2015, that ordering reunification services for mother would not serve R.J. and D.J.'s best interests. (§ 388, subd. (a)(1).)